

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

Defendant Walter Lefight Church has filed a motion seeking the dismissal of all charges against him on the grounds of prosecutorial misconduct due to the

government's failure to disclose certain impeachment evidence relating to one of the government's key witnesses against the defendant during his previous trial. Having reviewed the pertinent authority and the evidence in question, I deny the defendant's motion.

## I

The defendants Charles Wesley Gilmore and Walter Lefight Church are charged with various federal crimes arising out of the murders of Robert Davis, Una Davis, and Robert Hopewell, Jr., on April 16, 1989, in Pocahontas, Virginia.<sup>1</sup> The original indictment, returned December 13, 2000, charged Church and Samuel Stephen Ealy with the killings. Ealy was tried first and convicted and has been sentenced to life imprisonment. Church was thereafter tried, but the jury was unable to reach a unanimous verdict, and a mistrial was declared. Before Church's second trial was to begin, the government obtained a Superseding Indictment, adding

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<sup>1</sup> Specifically, the defendants are charged with conspiracy to murder Robert Davis in furtherance of a continuing criminal enterprise (Count One) (21 U.S.C.A. § 848(e)(1)(A) (West 1999)) and with killing Mr. and Mrs. Davis and Robert Hopewell in furtherance of a continuing criminal enterprise (Counts Two, Three, and Four). Both defendants are also charged with killing Robert Davis with the intent to prevent him from communicating with federal authorities (Count Five) (18 U.S.C.A. § 1512(a)(1)(C) (West 2000 & Supp. 2003)) and Church is charged with killing Una Davis and Robert Hopewell to prevent their communication with federal authorities (Counts Six and Seven). The government is seeking the death penalty for Church and Gilmore under Counts One, Two, Three, and Four.

Gilmore as a defendant. Defendant Sheri Lynn Howell Nichols was indicted separately by the government for allegedly providing perjurious testimony at Church's first trial. I consolidated the cases for trial, which is presently ongoing.

At Church's first trial, in 2002, the government relied extensively on the testimony of Richard D. Laszczynski, a jailhouse informant who befriended Church while the two were in prison on unrelated matters and who asserts that Church confessed to him about murdering the Davis family. Laszczynski's claim came to the government's attention in 1997, when Laszczynski contacted the United States Attorney's office. Thereafter, while the investigation was ongoing, Laszczynski wrote frequent letters to FBI agents assigned to the case.

The defendant's motion for prosecutorial misconduct centers on the disclosure of these letters by the government in compliance with its discovery obligations under *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963), and its progeny.<sup>2</sup> While most of these communications were disclosed in a timely manner before defendant Church's first trial, a set of eight or ten such letters that were not previously disclosed prior to the

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<sup>2</sup> Defendants Church and Nichols have filed motions asserting prosecutorial misconduct on several different grounds. These motions were generally resolved in a previously issued opinion. *See United States v. Gilmore*, Nos. 1:00CR00104, 1:03CR30014, 2004 WL 285941 (W.D. Va. Feb. 13, 2004). At the request of the defendant Church, the present ground was reserved for decision until after Laszczynski had testified in the current trial.

first trial were disclosed on January 26, 2004, days before the start of Church's present retrial. Church maintains that the late-discovered letters contain material impeachment information and that the government's failure to disclose them in a timely manner prior to Church's first trial prejudiced him. He asserts that the government's conduct constitutes a *Brady* violation and prosecutorial misconduct. The government responds that it has provided all discovery in a timely manner and that the set of letters recently discovered were filed in a separate FBI file and had been inadvertently overlooked by the agents and prosecutors culling material for discovery. The government further maintains that, in any event, the letters do not contain information whose concealment prejudiced the defendant during his first trial. The motion has been briefed and argued and is now ripe for decision.

## II

*Brady* held that due process mandates that the government disclose to a defendant all material evidence within its possession that is favorable to the accused. Favorable evidence includes evidence that is exculpatory of the defendant and evidence that would help the defendant impeach a government witness. A defendant alleging that the prosecution failed to meet its *Brady* obligations may obtain relief if (1) the evidence at issue was favorable to the defendant; (2) the evidence was

suppressed by the government; and (3) prejudice against the defendant ensued. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In order to show prejudice, the defendant must convince the court that there exists a reasonable probability that he would not have been convicted if the suppressed documents had been properly disclosed. *Id.*; *see also Banks v. Dretke*, No. 02-8286, 2004 WL 330030, at \*15 (U.S. Feb. 24, 2004); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

*Brady* is inapplicable to the issue at hand because defendant Church was not convicted at his first trial. Because the mistrial prevented the defendant from being convicted, the government's failure to disclose the evidence did not prejudice the defendant and is thus not a *Brady* violation. Thus, the defendant has no relief available under *Brady*. The letters in question were disclosed before the present trial and have been used in a lengthy cross-examination of the witness Laszczynski.

### III

As to non-*Brady* prosecutorial misconduct grounds, the defendant's motion is tenable only if he can show both that the government's conduct was knowing and improper and that the conduct "prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." *United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993). The FBI case agent has testified that he failed to uncover the letters

in question because of an accidental oversight. The defendant has not submitted any evidence to contradict this assertion, and I find that the government's failure to disclose was unintentional.

Even if I were to assume that the government's conduct was more culpable than the evidence suggests, I cannot find that the government's failure to disclose the letters in question prejudiced the defendant so as to deny him a fair trial. The letters in their substance exhibit Laszczynski's fear for his safety, his repeated requests for safer conditions, and his anticipation about when charges would be brought against Church. As the defendant highlights, there is one instance where Laszczynski states he will not testify unless he has the desired protection. However, that statement is simply consistent with Laszczynski's oft-expressed fears of the hostility of other inmates against a jailhouse informant. Although these letters may have some value as impeachment evidence against Laszczynski, they must be evaluated in light of all the other evidence available for impeachment on the issue at the first trial. Viewing all of this evidence as a whole, I find that the undisclosed evidence was not sufficiently prejudicial as to deny the defendant a fair trial. Therefore, the defendant has failed to show that the government has engaged in prosecutorial misconduct and that relief is warranted.

IV

For the foregoing reasons, it is **ORDERED** that defendant Church's supplemental motion for prosecutorial misconduct [Doc. No. 1008] is denied.

ENTER: March 2, 2004

/s/ JAMES P. JONES  
United States District Judge

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